ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of Rules and Policies	)	CS Docket No. 97-98
Governing Pole Attachments	)	

REPLY COMMENTS OF WORLDCOM, INC.

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TABLE OF CONTENTS

PAGE

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WorldCom, Inc. ("WorldCom"), by its attorneys, hereby files its reply comments in response to initial comments submitted by other parties concerning the Notice of Proposed Rulemaking ("Notice"), FCC 97-94, issued by the Commission on March 14, 1997 in the above-referenced proceeding.

I. INTRODUCTION AND SUMMARY

In its initial comments, WorldCom urged the Commission to adopt competitively-neutral and balanced rules governing the rates, terms, and conditions for telecommunications carriers to utilize pole attachments and conduit owned or controlled by other utilities. WorldCom explained that there are numerous instances where WorldCom and others must pay many times over what the cable television ("CATV") operator is paying for access to poles, conduit, or rights-of-way, or must pay significantly more in urban areas than in suburban or rural areas. The end result, of course, is a discriminatory obstruction to competition, in violation of the 1996 Act and to the detriment of consumers.

In this context, WorldCom urged the Commission to adopt rules that, at minimum: (1) require the incumbent local exchange carriers ("ILECs"), cable television operators, and other utilities to publish all agreements showing the rates they are charging to CLECs, IXCs, and each other for attaching to poles and utilizing conduit and rights-of-way; (2)

require a "most favored nation" treatment, so that any pole attachment or conduit usage rate provided by an incumbent to another entity under a new or preexisting agreement must be made available to any other requesting carrier upon the same terms and conditions; and (3) codify the Commission's authority and intention to assume jurisdiction over the rates, terms, and conditions of pole attachments and usage of conduit space where the state public service commission has failed to certify itself, failed to adopt rules, or failed to act on pending complaints in a timely fashion. WorldCom showed that these actions would help alleviate the continuing problem of unlawful rates and conditions imposed by incumbent utilities for attaching to poles or utilizing conduit or rights-of-way.

Dozens of other parties filed initial comments in this proceeding. In its reply, WorldCom will demonstrate that, despite the claims of some incumbent providers, the Commission possesses the requisite jurisdictional authority to adopt reasonable rates and conditions for competitive entities to attach to poles or utilize conduit or rights-of-way of incumbent providers.

II. MOST COMMENTERS AGREE THAT THE COMMISSION CAN AND SHOULD ADOPT COMPETITIVELY-NEUTRAL AND BALANCED RULES FOR USE OF POLE ATTACHMENTS AND CONDUITS

A. The FCC Is The Proper And Lawful Venue For These Issues

There should be little serious doubt that the FCC has full authority to adopt broad rules concerning the rates, terms, and conditions that incumbent utilities can charge for other entities to use their poles, conduit, and rights-of-way. Nonetheless, SNET apparently believes

that only the states, and not the FCC, should be involved in these types of issues.[1] The Electric Utilities (comprised of American Electric Power Service Corp., Commonwealth Edison Co., Duke Power Florida Power and Light, Northern States) also suggest that the Commission's jurisdiction over such issues is in question, based on what they label as "parallel issues" in the Eighth Circuit's Iowa Utilities Board decision.[2] Neither view is correct.

WorldCom believes it is crystal-clear that the Commission has the requisite jurisdictional authority to initiate this proceeding. The Commission long has had the authority to "regulate the rates, terms, and conditions for pole attachments to provide that such rates are just and reasonable...."[3] With the passage of the Telecommunications Act of 1996, and the advent of local competition, the Commission's role in this area has further expanded, not contracted. The 1996 Act plainly gives the FCC (and not the states) the authority to develop the specific formulas to determine the prices paid by both cable television systems and telecommunications carriers for attachments to poles, and use of space within ducts, conduit, or rights-of-way owned by other utilities (including power, water, and sewer companies).[4] The Commission also is empowered to develop a separate methodology to determine prices for telecommunications carriers that will become effective within five years of the enactment of the 1996 Act.[5] Moreover, where the state commission has failed to certify itself, failed to adopt

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[1] SNET Comments at 2.

[2] Electric Utilities Motion for Extension of Time, CS Docket No. 97-98, filed July 21, 1997, at 1; see Order, CS Docket No. 97-98, issued July 25, 1997.

[3] 47 U.S.C. Section 224(b)(1).

[4] 47 U.S.C. Section 224(b).

[5] 47 U.S.C. Section 224(d)(3); see also Notice at para. 5.

rules, or failed to act on pending complaints in a timely fashion, the Commission is fully empowered by statute to assume jurisdiction to require that the incumbent providers only charge "just and reasonable rates."[6] WorldCom strongly supports the Commission's assumption of jurisdiction in all such situations, and has already asked that the Commission adopt rules spelling out precisely when and how it will take on such authority.

The Iowa Utilities Board decision does not alter the Commission's jurisdictional authority in this area. The Eighth Circuit's focus on all times was the interconnection provisions contained in Section 251 of the Act.[7] While some -- such as WorldCom -- may dispute the legal basis for the Court's conclusions, it is beyond dispute that those conclusions rested on an interpretation of the Commission's jurisdiction to adopt pricing rules pursuant to Section 251. Importantly, the provisions now contained in Section 224 of the amended Act were never even mentioned by the Eighth Circuit in its decision. Moreover, the Court stressed several times that portions of Section 251 that explicitly gave the FCC jurisdictional authority were not disturbed by its holding.[8] Of course, Section 224 includes similar express authority.

Thus, the FCC possesses unassailable authority to undertake this important proceeding. WorldCom urges the Commission to use that authority to advance competition and prevent discrimination related to the rates, terms, and conditions set by incumbent providers for utilizing poles, conduit, and rights of way.

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[6] 47 U.S.C. Section 224(c); see also Notice at para. 3 n.10.

[7] See, e.g., Iowa Utilities Board v. FCC (8th Cir. 96-3321), issued July 18, 1997, slip op., at 153 (interconnection rules not expressly vacated are otherwise upheld as lawful).

[8] Id. at 103 n.10.

B. Existing Agreements Are Products Of Coerced, Monopolistic Environment

As indicated in its initial comments, WorldCom believes that the economic cost to ILECs of making excess capacity in their ducts and conduit available to carry competitors' cable and wiring is relatively small. Nonetheless, the ILECs -- fully aware that their competitors' success depends in large part on reasonable access to available conduit space -- have charged, and continue to charge, excessive and discriminatory rates for such usage. As a result, onerous and inequitable rates, terms, and conditions for attaching to poles, occupying conduit, or using rights-of-way continue to pose a serious real-world problem for competitive local exchange carriers such as WorldCom.[9]

Many parties agree with WorldCom that the FCC should presume that existing rates, terms, and conditions are not reasonable because they were imposed on third parties in a monopolistic environment. In particular, TCI is correct that voluntary negotiations alone must not be relied on by the Commission where utilities possess "bottleneck facility control."[10] Not surprisingly, however, several incumbent providers do not agree. For example, BellSouth states that "privately negotiated rates" should be presumed to be just and reasonable,[11] while SNET claims that the industry should rely solely on privately negotiated contracts.[12] The Edison Institute and UTC, the Telecommunications Association, argue jointly that existing contracts

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[9] WorldCom Comments at 4-6.

[10] TCI Comments at 8-10.

[11] BellSouth Comments at 2-3.

[12] SNET Comments at 5.

were freely negotiated,[13] and therefore that "market rates are a better reflection of appropriate pole attachment rates than is the FCC's formulaic rate proposal."[14] Edison and UTC elaborate that:

> The rates in these agreements do not reflect monopoly rents. They reflect, instead, the mutual sharing of burdens attributable to facilities which provide a mutual benefit to all the parties. These negotiated agreements have promoted the rapid development of new or upgraded infrastructure at the lowest cost for all interested parties.[15]

WorldCom strongly disagrees with these wholly unsupported conclusions. WorldCom believes that current negotiated rates should be presumed to be unjust and discriminatory because they were negotiated without any incentive on the part of the ILEC or other utility to provide just and reasonable rates. In most cases, CLECs were a captive market and had no leverage (prior to the 1996 Act) to force economically rational rates from ILECs and other utilities. Indeed, these supposedly "voluntary negotiations" usually were framed by the incumbent as "take it or leave it." In addition, WorldCom has had very little success to date in its efforts to reopen existing agreements in order to renegotiate excessive and discriminatory rates.

It is precisely because the market is not competitive -- because ILECs and other utilities are the monopoly provider of poles, conduit, and rights of way in the vast majority of cases -- that a prescriptive remedy is so desperately needed. The only "market rates" in existence are the monopoly rates forced onto competitors by incumbent providers. UTC's and

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[13] Edison/UTC Comments at 12.

[14] Edison/UTC Comments at 7.

[15] Edison/UTC Comments at 9-10.

Edison's complaint that the FCC's approach results in an unfair subsidy by the electric utilities is the conceptual equivalent of the distorted mirror at the carnival, where what is skinny is fat, and vice versa.

As a result, as urged in WorldCom's initial comments, the Commission must take prompt prescriptive action to compel the incumbent utilities to make public all rates, terms, and conditions of their agreements concerning pole attachments, conduit usage, and rights-of-way. In addition, on a forward-going basis, only TELRIC-based pricing, plus a modest profit, should be the maximum ceiling allowed by the Commission. Without such direction, incumbent utilities will continue to unabashedly claim the privilege of charging whatever they wish to charge, at the expense of new entrants in the telecommunications industry.[16]

The Electric Utilities claim that market constraints limit the amount the utilities can charge.[17] However, their one example -- that Louisville Gas & Electric Co. signed a deal to allow $156 million of fiber optic cable installed in its conduits -- is hardly a statement on the entire industry. Lacking substantive detail or context, that single example does nothing to demonstrate whether such agreements typically are freely negotiated by both the buyer and the seller.

SBC also asks the Commission to find that current rates are reasonable in order "to minimize the burden of unnecessary complaints."[18] The Commission should see through this rationale for what it is. Certainly the FCC should not presume that rates are not excessive

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[16] Of course, many of these utilities are planning to compete against the same new telecom entrants, and would in effect seek to be subsidized by those new entrants.

[17] Electric Utilities Comments at 41.

[18] SBC Comments at 42.

merely because an attacher has been paying the same or a higher rate without filing a complaint for a specified period of time. It is only with the passage of the Telecommunications Act of 1996 that competitors had any realistic hope of someday being able to right the wrong of monopoly rate dominance. As SBC knows very well, competitors who have pole/conduit agreements with SBC have been pursuing interconnection agreements and, with limited resources, have not been able to wage battles for relief on all fronts. WorldCom urges the Commission to presume the exact opposite: that all current rates were agreed to under duress, and therefore should be presumed unlawful. In addition, rates for poles, conduit, and rights-of-way should be made public, and tariffs should be filed listing prices, terms, and conditions.

C. The Commission Must Address Several Important Issues

1. General Issues

Although it is a natural economic compulsion for entities in a market to attempt to charge each other the maximum amount possible for a good or service, the resulting rates cannot be deemed reasonable where there is no free market constraint on that compulsion. In arguments over the proper formula for determining how much competitive entities pay incumbent providers to use their poles, conduits, and rights-of-way, utilities will seek to inflate their recoverable costs, and thereby both recover supracompetitive rates and inflict maximum economic burden on their current or potential competitors. The Commission must endeavor to make sure that utilities are not able to treat competitive entities as automatic profit centers.

WorldCom agrees with AT&T that the Commission should undertake three findings in this proceeding. First, an attacher should pay for the use of a given amount of

vertical space on a pole, or a given number of inner ducts in conduit, and that, subject to safety concerns, the attacher is free to deploy the attachment or attachments of its choice without incurring multiple or discriminatory charges. Second, the Commission should reject self-serving technical adjustments to inflate rates. Third, the Commission must develop a formula and rules to constrain conduit rates.[19]

WorldCom vigorously objects to the Electric Utilities' characterization that poles and conduits are not essential facilities for the cable and telecommunications industries.[20] This reasoning is simply invalid, as AT&T correctly points out.[21] Despite what the Electric Utilities say, there are still few alternatives to utility poles and conduit. This is particularly true because many rights-of-way holders, including local municipalities, often require utilities and new entrants to exhaust all existing pole and conduit space before installing new facilities.

WorldCom also objects to BellSouth's suggestion that stringent conditions should be imposed on all pole attachment/conduit complaint proceedings.[22] BellSouth and others are loathe to reap what they have sowed by their one-sided behavior in setting anticompetitive rates, terms, and conditions, and now are trying to sidestep responsibility for the consequences of their actions. The FCC should reject BellSouth's call for artificial and one-sided constraints on the complaint process.

Finally, Bell Atlantic and NYNEX propose to use gross instead of net book or

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[19] AT&T Comments at 4-5.

[20] Electric Utilities Comments at 34.

[21] AT&T Comments at 2.

[22] BellSouth Comments at 3-4.

plant value, and to using statutory federal income tax rather than taxes paid.[23] SBC also wants to use gross book costs for calculations of payments made by others, but net the amount of tax and other return components that would lower the overall amount.[24] This appears to be nothing more than a ploy to maximize recoverable costs. There is no good reason why WorldCom should pay above and beyond what the ILECs pay, thereby giving them an inappropriately greater rate of return, which becomes not a mere recoupment of expense but actually a bonus.

2. Conduits

The issue of how to determine conduit rates is an important one. For example, SBC reveals its intent to use conduit fees as a revenue-enhancement rather than a means to recover costs when it states that "the Commission should adopt a simple method of calculating maximum rates for conduit use."[25] For the reasons expressed above, the Commission should reject this rationale outright.

Edison and UTC believe that it is reasonable to require the first installing provider to pay for the complete installation of inner duct.[26] This scenario is reasonable only if the utility acknowledges that the entity which paid for the installation also owned, and could rent and receive reimbursement for, such facilities as the entity saw fit.

Concerning the formulas themselves, AT&T claims that conduit rates should be

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[23] Bell Atlantic/NYNEX Comments at 2.

[24] SBC Comments at 6-10.

[25] SBC Comments at iii.

[26] Edison/UTC Comments at 22.

based on 4 inner ducts, creating a one-third rate rather than a half duct rate that the Commission proposes. In contrast, MCI argues for rates based on 3.5 instead of a half-duct rate. WorldCom agrees with MCI's 3.5 figure. Half a duct appears to be far too generous to the incumbent, resulting in an over-recovery of "costs." WorldCom also agrees with MCI that one innerduct is an appropriate reserve figure, and 3.5 is the appropriate number of innerducts per duct, as with underground conduit.[27] A half-duct convention would be inappropriate and result in excessive rates.

SBC states that "a reasonable and practical method of applying the half-duct convention in the context of inner duct is to presume that each inner duct occupies a half duct of space."[28] WorldCom believes that this reasoning is incorrect, and will result in excessive overcharging to each user, thereby reaping SBC a windfall. SBC goes on to claim that less than 20 percent of its duct capacity uses 4-inch duct.[29] WorldCom is not convinced of the accuracy of this figure, and in any event SBC provides no substantiation.

3. Pole Attachments

WorldCom agrees with MCI that the utilities have failed to prove that 35 foot poles are being replaced with 40 foot poles.[30] Instead, WorldCom urges the Commission to continue using its presumptive pole height of 37.5 feet for poles. While some utilities may be

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[27] MCI Comments at 27.

[28] SBC Comments at 28.

[29] SBC Comments at 29-30.

[30] MCI Comments at 2-3.

slowly migrating to taller poles, the rate or scale of such migration is not readily apparent from the record, and therefore would be an inappropriate basis for such a significant change in calculation. Retaining the 37.5 foot as an average height remains valid because it takes into account both shorter and taller poles. No commenter has demonstrated a compelling need for a different average height.

Further, WorldCom believes that make-ready work, upgrades, and rearrangement costs should be borne directly by the requesting party. Without this caveat, as MCI points out, additional capacity is created that reverts back to the incumbent, resulting in a double recovery of costs.[31]

The so-called "Electric Whitepaper" indicates that the average usable pole space is only 11 feet, rather than the current 13.5 feet. WorldCom seriously doubts the veracity of this calculation. As MCI observes, in 1978 the industry claimed that there was 16 feet of usable space.[32] The utilities have failed to show how and why this original figure has decreased so rapidly.

WorldCom agrees with MCI that the pole attachment formula should be changed.[33] MCI argues that the rate of return for pole attachments should be based on the interstate rate of return. Other parties seek a rate of return of 11.25%, which WorldCom believes is far too high. The ILECs and other utilities should only be allowed to recover their actual costs. In the alternative, WorldCom supports a rate of return of no more than 10 percent.

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[31] MCI Comments at 5-6.

[32] MCI Comments at 9-10.

[33] MCI Comments at 15-16.

SBC claims that there are artificially low pole attachment rates, caused by the large negative net salvage reflected in the depreciation reserve for poles.[34] Bell Atlantic also claims to have a net negative pole investment in D.C.[35] However, neither ILEC has proved its case that this is a widespread crisis. Moreover, fees are meant to recover just and reasonable costs incurred for the pole or conduit, not to reimburse the ILEC for all of its costs, or to pay the ILEC for its use of the pole/conduit. Intriguingly, Ameritech says it has not encountered the negative rate problem raised by SBC; in fact, Ameritech indicates that accumulated depreciation balances are expected to exceed gross pole investments within the next 3 to 8 years.[36]

Concerning pole rental fees paid to others, Ameritech states that "payments for space for attachments actually used by the incumbent carrier and not subleaseable are not properly included in the formula."[37] WorldCom agrees. However, when an incumbent has the right to sublease, then payments for that space should not be included in the formula because the incumbent will recover fees directly from the third party for that space.

Finally, although WorldCom supports TCI's observation concerning the threat of utilities preventing or delaying access to poles or raising rates,[38] WorldCom disagrees with TCI's additional view that pole fees are unique among costs for providing CATV service, as

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[34] SBC Comments at i.

[35] Bell Atlantic Comments at 3.

[36] Ameritech Comments at 1-2.

[37] Ameritech Comments at 4.

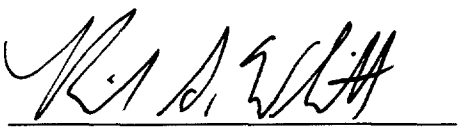
[38] TCI Comments at 7.

well as its suggestion for a separate proceeding.[39] There is no rational support for TCI not to be faced with paying the same prices, particularly when the same facilities used for CATV service can also be used to provide telecommunications services.

III. CONCLUSION

In accordance with these reply comments and WorldCom's initial comments in this proceeding, the Commission should adopt competitively-neutral and balanced rules governing the rates, terms, and conditions for competing telecommunications providers to utilize pole attachments, conduit, and rights-of-way owned or controlled by other utilities. In particular, competitors should pay only cost-based rates, rather than being treated as captive profit centers, and incumbent utilities must make public their agreements, including rates, terms, and conditions for providing access to poles, conduits, and rights of way.

Respectfully submitted,



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[39] TCI Comments at 9.

CERTIFICATE OF SERVICE

I, Cecelia Y. Johnson, hereby certify that I have this 11th day of August, 1997, sent a copy of the foregoing "Reply Comments of WorldCom" by hand delivery to the following:

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